

8:45 **FILED** A.M.
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MAY - 5 2011

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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,
vs.

JAMES ARTHUR RAY,
Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
MOTION TO EXCLUDE CUMULATIVE
TESTIMONY PURSUANT TO RULE 403**

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves to exclude the testimony of additional participants from the 2009 JRI sweat lodge ceremony. Testimony from these witnesses would be cumulative and is thus subject to exclusion under Arizona Rule of Evidence 403. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This trial is scheduled to conclude, at the latest, on June 10. On May 3—after roughly 40 trial days, and eleven weeks after jury selection began—the State provided by email a list of its 12–15 remaining trial witnesses, and reserved the right to call more witnesses. *See* Exhibit A, email from Sheila Polk to Luis Li, 5/3/11. This list includes 7 witnesses who would testify about their experience as participants at the 2009 Spiritual Warrior Retreat. The testimony of these witnesses would repeat accounts the jury has already heard. Moreover, permitting all of these witnesses to testify would essentially make it impossible for the trial to conclude by the scheduled outside date of June 10. Indeed, the testimony of the twelve 2009 Spiritual Warrior participants who have already testified in this trial consumed approximately four weeks.

In light of these considerations, along with the overarching consideration that every criminal trial in Arizona should provide for a “just, speedy determination” of the issues and should avoid “unnecessary delay and expense,” Ariz. R. Crim. P. 1.2, the additional participant witnesses should be excluded pursuant to Rule 403.

II. ARGUMENT

Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of *undue delay, waste of time, or needless presentation of cumulative evidence.*” Ariz. R. Evid. 403 (emphasis added). Pursuant to this rule, which is common to the state and federal evidence codes, courts have “broad authority to impose reasonable time limits” during trial to “prevent ... needless presentation of cumulative evidence.” *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1070-71 (9th Cir. 2005). “Likewise,” trial courts have “broad authority to limit the number of witnesses on a particular point to avoid cumulative evidence.” *Id.* *See also Loux v. United States*, 389 F.2d 911, 917 (9th Cir. 1968) (“As a practical matter, the court needs the right to impose some limitation on the number of witnesses testifying about a particular fact. Decision as to how many must be left to the sound discretion of the judge.”).

1 Arizona courts regularly apply Rule 403 to exclude cumulative testimony, and indeed
2 have an obligation to do so to ensure that a trial proceeds in accordance with the purpose
3 articulated in the Arizona Rules of Evidence: “to secure fairness in administration, *elimination of*
4 *unjustifiable expense and delay*, and the promotion of the growth and development of the law of
5 evidence to the end that the truth may be ascertained and proceedings justly determined.” Ariz.
6 R. Evid. 102; *see also* Ariz. R. Crim. P. 1.2 . For example, in *State v. Parker*, 121 Ariz. 172, 174
7 (App. 1978), a co-defendant allegedly made statements exculpating the appellant (Parker) to a
8 deputy sheriff and two county jail inmates. The trial court admitted one inmate’s testimony but
9 excluded the testimony of the sheriff and the other inmate as cumulative. *See id.* at 173. As the
10 court of appeals explained, “[t]he trial judge has discretion to exclude cumulative testimony”
11 pursuant to Rule 403.” *Id.* at 174. Because “the excluded witnesses would have repeated what
12 the jury had already heard,” the trial court’s exclusion of the testimony was consistent with Rule
13 403 and did not violate due process. *Id.* *See also State v. Wargo*, 145 Ariz. 589, 590 (App. 1985)
14 (“While we believe that the witnesses should not have been precluded as a discovery sanction, the
15 trial judge nonetheless could have precluded them on the ground that their testimony was so
16 marginally relevant and cumulative of stronger testimony that its probative value was
17 substantially outweighed by considerations of delay and confusion under Rule 403”); *State v.*
18 *Machado*, 224 Ariz. 343, 355 (App. 2010) (holding that “the trial court did not err in precluding
19 evidence about . . . incidents” “would have been cumulative”).

20 Exclusion of cumulative testimony is warranted here with respect to the additional
21 participants the State has listed from the 2009 JRI Spiritual Warrior Retreat. These witnesses
22 would essentially repeat the accounts that the jury has already heard from the testimony of
23 numerous other participants in the 2009 retreat. For the Court’s consideration, the following
24 summaries offer a general overview of the expected testimony of the remaining participant
25 witnesses.¹

26
27
28 ¹ The witnesses’ complete interview transcripts were marked as exhibits prior to trial and are available for the Court’s
plenary review.

1 **A. Kim Brinkley**

2 Kim Brinkley was a participant in the 2009 JRI sweat lodge. She stayed inside for the
3 entire sweat lodge ceremony. *See* Exhibit 613, Transcript of Interview of Kim Brinkley by
4 Detective Diskin, June 6, 2010, at p. 20. She would have spoken up if she had felt that she was in
5 distress. *See id.* at 29. To the extent her statements are not cumulative, the additional information
6 she offers would appear to be barred under Rule 403. Ms. Brinkley has stated that she was
7 “really angry” with Mr. Ray in the months following the sweat lodge, and that she conducted
8 online research that she believes undermines Mr. Ray’s “credentials”—for example, that he is not
9 certified by Stanislav Grof to lead “holotropic breathwork.” *See* Exhibit 615, Transcript of
10 Interview of Kim Brinkley by Truc Do, December 21, 2010, at 9, 15. The Court has already ruled
11 that evidence related to allegedly “improper and unlicensed facilitation of a breathing session” “is
12 only marginally relevant such that its admission is barred by Rule 403.” Under Advisement
13 Rulings on State’s Motions to Extend Time for Disclosure, issued April 19, 2011, at p.3.²

14 **B. Danielle Granquist**

15 Danielle Granquist was a participant in the 2009 JRI sweat lodge. She read the waiver in
16 advance of the seminar and knew a sweat lodge would occur. *See* Trial Exhibit 651, Transcript of
17 Interview of Danielle Granquist by Sgt. Boelts, October 2009, at p. 5. She remembers being
18 instructed that “you can get out at any time, but it’s best if you do it when the door is opened,
19 because otherwise it’s pitch black and then you might fall in the pit.” *Id.* p. 7. She was seated
20 near Liz Neuman, next to Laura Tucker, and left toward the end of the ceremony. Danielle did
21 not know anything was wrong with Liz until after the ceremony ended. *See id.* at p. 4. She
22 believes she experienced an “altered” state in the sweat lodge, but “was totally fine” when she left
23 and “didn’t feel sick.” Trial Exhibit 653, Transcript of Interview of Danielle Granquist by
24 Detective Diskin, Feb. 4, 2010, at p.4.

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26
27 ² *See id.* (“Again,” the Court ruled, “propensity evidence - evidence suggesting that if the Defendant recklessly or
28 negligently proceeded without proper training and licensing for a breathing exercise, he would recklessly subject
sweat lodge participants to a risk of death - is inadmissible.”).

1 **C. Mark Rock**

2 The Court has heard Mark Rock's testimony at the 404(b) hearing in November 2010.
3 Mr. Rock was a Dream Team member at the 2009 sweat lodge and a participant in the 2008 sweat
4 lodge. In 2009, he stayed in the sweat lodge for the entire ceremony and lifted the tent flap
5 periodically to get more oxygen. He felt he "could have left" but "chose not to." Trial Exhibit
6 697, Interview of Mark Rock by Detective Parkison, Oct. 8, 2009, at p.9. Because he was a
7 member of the Dream Team, he did not participate in the Vision Quest in 2009.

8 **D. Lisa Rondan**

9 Lisa Rondan was a Dream Team member at the 2009 Spiritual Warrior Retreat and is a
10 nurse. She was stationed outside the sweat lodge for the entire ceremony and cannot testify to
11 what went on inside the sweat lodge. *See* Trial Exhibit 714, Transcript of Interview of Lisa
12 Rondan by Detective Edgerton, Oct. 28 and 29, 2009; Exhibit 716, Transcript of Interview of Lisa
13 Rondan by Detectives Diskin and Poling, Dec. 17, 2009. As to the scene outside the sweat lodge,
14 her testimony would be cumulative of that of others, including Jennifer Haley, who have testified
15 extensively about observations outside the tent during the ceremony.

16 **E. Sydney Spencer**

17 Sydney Spencer was a participant in the 2009 JRI sweat lodge. She lost consciousness
18 around the sixth round. Prior to losing consciousness, she states that she did not feel sick and did
19 not hear any other participants express distress. *See* Trial Exhibit 720, Transcript of Interview of
20 Sydney Spencer by Detective Parkison, Oct. 13, 2009, at p.15, 17. She has "no memory" of her
21 symptoms or treatment between leaving the sweat lodge and waking up in the ICU. *Id.* at 22.
22 Ms. Spencer, together with co-plaintiff Dennis Mehraver, later filed a civil lawsuit against Mr.
23 Ray.

24 **F. Dawn Gordon**

25 Dawn Gordon was a participant in the 2009 JRI sweat lodge. She remained in the lodge
26 for the entire ceremony. She has stated that she helped James Shore pull Sydney Spencer out of
27 the lodge around the sixth round, and helped Mr. Shore attend to Kirby Brown around the seventh
28 round. *See* Trial Exhibit 695, Transcript of Interview of Dawn Gordon by Detective Parkison,

Oct. 8, 2009 at pp. 9, 12. Trial Exhibit 647, Transcript of Interview of Dawn Gordon by Sgt. Boelts, Oct. 12, 2009. She did not suffer medical symptoms from the sweat lodge.

G. Sean Ronan

Sean Ronan was a participant in the 2009 JRI sweat lodge. He lost consciousness during the ceremony but remained inside until he was carried out of the lodge after the ceremony ended. According to statements made to Detective Willingham on October 14, 2009, Mr. Ronan sat next to James Shore and did not notice people around him experiencing physical distress.³

III. CONCLUSION

Pursuant to Rule 403, in keeping with this trial's scheduled end date, and in accordance with the court's obligation to oversee a fair and orderly trial that avoids undue consumption of time, this Court should exclude repetitive testimony from participants in the 2009 Spiritual Warrior Retreat.

DATED: May 5, 2011

MUNGER, TOLLES & OLSON LLP

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By: 

Attorneys for Defendant James Arthur Ray

Copy of the foregoing delivered this 5 day of May, 2011, to:

Sheila Polk
Yavapai County Attorney
Prescott, Arizona 86301

by 

³ Because Mr. Ronan was not initially listed as a trial witness, the transcript of his interview was not marked as an exhibit. Both parties have a copy of the transcript and can provide a copy to the court upon request.

Seifter, Miriam

From: Sheila Polk [Sheila.Polk@co.yavapai.az.us]
Sent: Tuesday, May 03, 2011 9:30 AM
To: Li, Luis
Cc: Do, Truc; Seifter, Miriam; tkkelly@kellydefense.com; Penny Cramer, Bill Hughes, Kathy Durrer; Ross Diskin
Subject: RE. JPEGS and witness lists

Dear Luis,

Thank you for your efforts to identify by jpeg numbers the photos. We will print new photos of all the exhibits that appear to be sub-par and show them to you tomorrow. I hope the parties can then agree as to which photos can be substituted as exhibits.

The State intends to call the following witness:

Dr. Mosley
Dawn Sy
Steve Page
Dr. Matthew Dickson
Det. Frank Barbaro
Sarah Mercer
Lisa Rondon
Dr. David Kent
Mark Rock
Kim Brinkley
Danielle Granquist
Doug Sundling

We may call
Sydney Spencer
Dawn Gordon
Sean Ronin

We reserve the right to call any of the State's witnesses not listed above.

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From: Li, Luis [mailto:Luis.Li@mto.com]
Sent: Tuesday, May 03, 2011 9:23 AM
To: Sheila Polk; Penny Cramer; Bill Hughes
Cc: Do, Truc; Seifter, Miriam; tkkelly@kellydefense.com
Subject: JPEGS and witness lists

Dear Sheila and Bill,

We were not able to reverse engineer the jpeg numbers from our display program this weekend. Part of the problem is that there is no obvious "techie" way to do it and it may have to be done "manually."

5/4/2011

Since I think we are really only talking about 10-15 photos, I think the best way to proceed is for you to supply the exhibit numbers that you all think are poorly printed and we'll try to figure out what the jpeg numbers are

On another note, since we seem to be coming close to the end of the State case, we would appreciate your final witness list. Obviously, this will aid in scheduling, among other things, the defense case and any motions practice that the parties may contemplate.

If we can get the information from you regarding exhibit numbers and a witness list as soon as possible, we should be able to make at least some productive use of the day. Thanks in advance

Best,
Luis